No. 94-1471 16

In The
Supreme Court of the United States

October Term, 1995

VARITY CORPORATION,

Petitioner,

v.

CHARLES HOWE, ROBERT WELLS, RALPH W. THOMPSON, PATRICK MOUSEL, on Behalf of Themselves and as Representatives of a Class of Persons Similarly Situated, JOHN ALTOMARE, CHARLES BARRON, ALEXANDER CHARRON, CHARLOTTE CHILES, ANITA CROWE, RAY DARR, DORIS GUIDICESSI, BARNETT LUCAS, ROBERT SKROMME, and the Estate of WALTER SMITH, individually,

Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Eighth Circuit

BRIEF OF AMICUS CURIAE NATIONAL ASSOCIATION OF SECURITIES AND COMMERCIAL LAW ATTORNEYS (NASCAT) IN SUPPORT OF RESPONDENTS

KEVIN P. RODDY
Counsel of Record
MILBERG WEISS BERSHAD
HYNES & LERACH
355 South Grand Avenue
Suite 4170
Los Angeles, CA 90071
Telephone: 213/617-9007

JONATHAN W. CUNEO
General Counsel
NASCAT
317 Massachusetts Avenue, N.E.
Washington, DC 20002

Counsel for Amicus Curiae

[Additional Counsel Appear on Signature Page]

COCKLE LAW BRIEF PRINTING CO., [illegible]
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INTEREST OF *AMICUS CURIAE*

The National Association of Securities and Commercial Law Attorneys ("NASCAT") is an association of law firms and attorneys who litigate cases involving antitrust, commercial, consumer, employee and retiree benefits, environmental and securities fraud claims in federal and state courts. NASCAT's members represent victims of corporate abuse, fraudulent schemes and so-called "white-collar" criminal activity, including victims of the type of pension and benefits fraud at issue in this case. In civil actions challenging such wrongdoing, NASCAT's members not only seek compensation for victims, but also attempt to deter wrongdoers, modify corporate behavior and improve the access of victims to justice. As part of these efforts, NASCAT advocates the enactment and enforcement of effective state and federal laws to prevent wrongful, fraudulent, deceptive and manipulative business practices.

Claims arising under the Employee Retirement Income Security Act of 1974 ("ERISA"), as amended, 29 U.S.C. §1001, *et seq.*, are an important weapon used by NASCAT members to enforce employees and retirees' rights. Accordingly, with the written consent of the parties, NASCAT files its *amicus curiae* brief in support of Respondents and urges this Court to affirm the decision of the court below.[1]

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[1] The decision of the court below is reported as *Howe v. Varity Corp.*, 36 F.3d 746 (8th Cir. 1994), *cert. granted*, ___ U.S. ___, 115 S. Ct. 1792. Citations to the slip opinion reprinted in Petitioner's Appendix are stated herein as "___a."

INTRODUCTION AND SUMMARY OF ARGUMENT

As set forth in the undisputed findings of fact entered by the district court and affirmed by the Eighth Circuit Court of Appeals, Petitioner, through a scheme it code-named "Project Sunshine," induced Respondents to transfer their employment to Massey Combines Corporation ("MCC") for the purpose of ridding Massey-Ferguson, Inc. ("M-F") and Varity Corporation ("Varity") of substantial obligations for employee benefits. 54a, 57a, 62a, 64a-65a. Acting with intent to deceive, Petitioner made material misrepresentations and concealed material facts in order to induce its employees to cease participation in viable benefit plans and, instead, to join new ones that were doomed to fail. *Id.*

From the outset of its fraudulent scheme, Petitioner purposefully disseminated incomplete, confusing and deceptive communications regarding Project Sunshine.[2] Although it developed accurate and forthright communications concerning the plans and benefits thereunder, Petitioner opted *not* to disseminate them for fear that employees who obtained accurate and complete information

[2] The fact that Petitioner named the program "Project Sunshine," casts serious doubt over whether it took its fiduciary obligations under ERISA seriously or even understood the concept. The word "sunshine" is frequently used to refer to hopefulness for the future or openness and disclosure. *See* Webster's *Third New International Dictionary* 2292 (1986) (listing one definition of "sunshine" as "radiating optimism"); Government in the Sunshine Act, Pub. L. 94-409, 90 Stat. 1247, codified at 5 U.S.C. §552b (requiring that meetings of federal agencies "shall be open to public observation"); L. Brandeis, *Other People's Money* 62 (1914) ("[s]unlight is said to be the best of disinfectants").

would refuse to be transferred to MCC. 63a-64a. Petitioner misrepresented MCC's financial outlook and the nature of future employee benefits, anticipating and intending that employees would sign up for Project Sunshine, thereby ridding M-F and Verity of huge benefit liabilities and transferring the liabilities to a shell company that was earmarked for failure. 55a-56a, 63a-65a. Petitioner even assured participants that their benefits would remain unchanged, even though MCC was deliberately set up to fail. 64a. Petitioner knew that its communications were materially misleading when they were given and the employees relied on them to their detriment. 65a.

After hearing all of the evidence in this case, the trial court concluded as follows:

> Varity and Massey Ferguson were in no different a situation than any of the other agricultural equipment manufacturers experiencing tough financial constraints during this period. However, in the face of difficult financial times Varity disregarded existing law and devised a plan which dramatically cut its debt burden and heritage costs. Project Sunshine was nothing more than a brilliant manipulative effort to sever retiree welfare obligations which had become a burdensome load on a financially strapped company. Project Sunshine was a sucker punch on loyal employees who had given a lifetime of service to a company and who had been induced into believing that their benefits coverage could not be terminated once they retired. ERISA was enacted to prevent just such a maneuver as was undertaken in Project Sunshine.

114a.

Left with no other argument, Petitioner contends in this Court that it can escape liability for its deliberate misrepresentations because it supposedly made those misrepresentations while acting outside of its fiduciary capacity.[3] While it may have been a business decision (exempt from ERISA's fiduciary standards) for Petitioner to improve Varity's balance sheet by creating MCC and undercapitalizing it, Petitioner was acting as fiduciaries of both the old and new plans when it intentionally misled Respondents into "voluntarily" relinquishing participation in viable plans and induced them to join new ones that were destined to fail.[4]

Petitioner cynically submits that ERISA provides no remedy where (as here) a fiduciary issues false and misleading statements which result in harm to a participant or beneficiary, even though it knows that ERISA may well preempt any remedies that would otherwise be available under state law.[5] Petitioner's argument finds no support

[3] In order to determine whether Petitioner acted as a fiduciary, the Court must examine the particular activity that is at issue and *not* Petitioner's self-proclaimed non-fiduciary status. *See Coleman v. Nationwide Life Ins. Co.*, 969 F.2d 54, 61 (4th Cir. 1992), *cert. denied*, ___ U.S. ___, 113 S. Ct. 1051 (1993).

[4] MCC adopted no employee benefits plan for the first year of the company's operation, at which point it adopted the M-F plan. Prior to that, MCC simply used the M-F plan. 76a. Throughout MCC's existence, Varity and M-F were fiduciaries of MCC's employee benefit plans, M-F's board of directors was the "named fiduciary" and M-F was the "administrator" and "plan sponsor." 78a-79a. Thus, Petitioner was a fiduciary of both the old and new plans.

[5] *See Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 48 (1987) (common law tort claims that "relate to" an employee benefit plan are preempted by ERISA); *Shaw v. Delta Airlines, Inc.*, 463 U.S. 85, 92 (1983) (ERISA's preemption provision is not limited to state laws addressing the subject matters specifically addressed by ERISA); *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 523 (1981) (same). *But see Farr v. U.S. West, Inc.*, No. 93-35086, 1995 U.S. App. LEXIS 15705 (9th Cir. June 26, 1995) (misrepresentations regarding the tax consequences of a lump sum withdrawal from pension plan not preempted); *Forbus v. Sears Roebuck & Co.*, 30 F.3d 1402, 1405-06 (11th Cir. 1994) (fraud claim arising from employer's false statement that plant was being shut down held not preempted even though plaintiffs' damages may be affected by calculation of pension benefits), *cert. denied*, ___ U.S. ___, 115 S. Ct. 906 (1995).

in ERISA's text, structure, or legislative history, and it is inconsistent with sound public policy. In this important case, which may well affect the rights and benefits owed to hundreds of thousands of employees and retirees, there is simply no question but that Petitioner breached its fiduciary duties to Respondents and that Respondents are entitled to the relief they were awarded. To hold otherwise would immunize fiduciaries from claims for egregious breaches of the duties they owe under ERISA to participants and beneficiaries of employee benefit plans.

ARGUMENT

A. THE EXISTENCE AND SCOPE OF FIDUCIARY DUTIES UNDER ERISA'S STATUTORY SCHEME: SECTION 404

Sections 404(a) and 406 of ERISA specify the basic duties of a fiduciary: A fiduciary must discharge his or her duties solely in the interest of the participants, for the exclusive purpose of providing benefits to participants,

with care, skill, prudence, and diligence. 29 U.S.C. §§ 1104(a), 1106. In the words of Judge Friendly, the obligations of a fiduciary under ERISA are "the highest known to the law." *Donovan v. Bierwirth*, 680 F.2d 263, 272 n.8 (2d Cir.), *cert. denied*, 459 U.S. 1069 (1982) (citation omitted).

By enacting Section 404(a) and 406 of ERISA, Congress intended that fiduciary duties imposed under ERISA should parallel fiduciary duties owed at common law:

> [R]ather than explicitly enumerating *all* of the powers and duties of trustees and other fiduciaries, Congress invoked the common law of trusts to define the general scope of their authority and responsibility.

Central States, Southeast & Southwest Areas Pension Fund v. Central Transp., Inc., 472 U.S. 559, 570 (1985) (footnote omitted; emphasis in original).[6]

[6] *See Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 111-14 (1989) (ERISA is to be construed under principles of trust law not to afford less protection to employees than they enjoyed before ERISA was enacted); *Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 152-53, 156-57 n.6 (1985); *Donovan v. Cunningham*, 716 F.2d 1455, 1464 (5th Cir. 1983), *cert. denied*, 467 U.S. 1251 (1984) (ERISA's legislative history indicates that Congress intended to incorporate in §404 the "core principles of fiduciary conduct" that were developed in the common law of trusts, but with modifications appropriate for employee benefit plans); *see also Fink v. National Sav. & Trust Co.*, 772 F.2d 951, 955 (D.C. Cir. 1985); *Mahoney v. Board of Trustees*, 973 F.2d 968, 971 (1st Cir. 1992) (Breyer, J.); *Bierwirth*, 754 F.2d at 1055; *McMahon v. McDowell*, 794 F.2d 100, 110 (3d Cir. 1986), *cert. denied*, 479 U.S. 971 (1986); *Witmeyer v. Kilroy*, 788 F.2d 1021, 1025 (4th Cir. 1986); *Cunningham*, 716 F.2d at 1464; *De Marco v. C & L Masonry, Inc.*, 891 F.2d 1236, 1240 (6th Cir. 1989); *Petrilli v. Drechsel*, 910 F.2d 1441, 1448-49 (7th Cir. 1990); *Donovan v. Mazzola*, 716 F.2d 1226, 1231 (9th Cir. 1983), *cert. denied*, 464 U.S. 1040 (1984); *Eaves v. Penn*, 587 F.2d 453, 462 (10th Cir. 1978).

At common law, fiduciaries were required, at a minimum, to fully disclose all facts within their knowledge which beneficiaries required to protect their interests. *See, e.g.*, Edward E. Bintz, *Fiduciary Responsibility Under ERISA: Is There Ever A Fiduciary Duty To Disclose?*, 54 U. Pitt. L. Rev. 979, 985-87 (1993) (*"Fiduciary Responsibility"*); *see also Restatement (Second) of Trusts* §173, comment d (1959) ("[The trustee] is under a duty to communicate to the beneficiary material facts affecting the interest of the beneficiary which he knows the beneficiary does not know and which the beneficiary needs to know for his protection in dealing with a third person. . . . "). Thus, the duty to tell the truth lies at "the core of a fiduciary's responsibility" under ERISA. *Eddy v. Colonial Life Ins. Co.*, 919 F.2d 747, 750 (D.C. Cir. 1990); *see also Peoria Union Stock Yards Co. Retirement Plan v. Penn Mut. Life Ins. Co.*, 698 F.2d 320, 326 (7th Cir. 1983) (Posner, J.) ("Lying is inconsistent with the duty of loyalty owed by all fiduciaries and codified in [§404]. . . . ").[7]

[7] *Accord Vartanian v. Monsanto Co.*, 14 F.3d 697, 702 (1st Cir. 1994); *Bixler v. Central Penn. Teamsters Health & Welfare Fund*, 12 F.3d 1292, 1300 (3d Cir. 1993); *Fischer v. Philadelphia Elec. Co.*, 994 F.2d 130, 133 (3d Cir.), *cert. denied*, ___ U.S. ___, 114 S. Ct. 622 (1993); *Drennan v. General Motors Corp.*, 977 F.2d 246, 251 (6th Cir. 1992), *cert. denied*, ___ U.S. ___, 113 S. Ct. 2416 (1993); *Berlin v. Michigan Bell Tel. Co.*, 858 F.2d 1154, 1163 (6th Cir. 1988).

B. PETITIONER IS LIABLE UNDER ERISA FOR ACTIONS TAKEN TO IMPLEMENT ITS DECISIONS CONCERNING THE EMPLOYMENT BENEFIT PLANS

At common law, fiduciaries were prohibited from holding a position that created a conflict of interest (or even a potential conflict of interest) with beneficiaries. In the words of this Court:

> To deter the trustee from all temptation and to prevent any possible injury to the beneficiary, the rule against a trustee dividing his loyalties must be enforced with "uncompromising rigidity." A fiduciary cannot contend "that, although he had conflicting interests, he served his masters equally well or that his primary loyalty was not weakened by the pull of his secondary one."

NLRB v. Amax Coal Co., 453 U.S. 322, 329-30 (1981) (citations omitted). This was an absolute rule: Faced with a conflict, resignation or recusal were the only avenues available to the fiduciary. G.G. Bogert & G.T. Bogert, *The Law of Trusts & Trustees* §543, at 218, 264 (2d rev. ed. 1993).

Following the common law, in Section 406 of ERISA Congress enacted a detailed list of prohibited transactions, *see* 29 U.S.C. §1106, and "[t]he object of Section 406 was to make illegal per se the types of transactions that experience had shown to entail a high potential for abuse." *Cunningham*, 716 F.2d at 1464-65 (citation omitted). Bearing in mind the special relationship between plan sponsors and their plans, however, Congress enacted a limited exception to that common law rule: Under Section 408(c)(3) of ERISA, it is not a *per se* breach of fiduciary duty for a person to serve as a fiduciary and

also be an officer, employee, or other representative of a plan sponsor. *See* 29 U.S.C. §1108(c)(3); *Cunningham*, 716 F.2d at 1466 ("[I]n ERISA Congress departed from the absolute common law rule against fiduciaries' dual loyalties."). As Judge Friendly has stated:

> "Since . . . an employer will often be an administrator of his plan, or will function as a trustee or in some other fiduciary capacity, this provision creates a limited exception to the listed proscription against self-dealing. The exception is made in recognition of the *symbiotic relationship* existing between the employer and the plan covering his employees."

Bierwirth, 680 F.2d at 271 (citation omitted).

Section 408(c)(3), however, presents no license for corporate agents who are also plan fiduciaries to forsake their duties under ERISA in favor of loyalties to the corporation. To the contrary, when acting as plan fiduciaries corporate employees still have the same statutory obligation to discharge their duties "solely in the interest of the participants," with "care, skill, prudence, and diligence," and free from prohibited transactions – as plan fiduciaries who are not corporate employees. As this Court has stated:

> Although [Section] 408(c)(3) of ERISA permits a trustee of an employee benefit fund to serve as an agent or representative of the union or employer, that provision in no way limits the duty of such a person to follow the law's fiduciary standards while he is performing his responsibilities as trustee.

Amax Coal, 453 U.S. at 333 n.16. Thus, for corporate directors, officers, or employees who are *also* fiduciaries,

Section 408(c)(3) merely provides an exception to the rule that having dual positions, without more, is a *per se* breach of fiduciary duty.[8]

Since the wearing of "two hats" is permissible, *Barnes v. Lacy*, 927 F.2d 539, 544 (11th Cir.), *cert. denied*, 502 U.S. 938 (1991), the Department of Labor has endeavored to define the function performed by employer/fiduciaries in each of the roles:

> [I]n light of the voluntary nature of the private pension system governed by ERISA, the Department has concluded that there is a class of discretionary activities which relate to the formation, rather than the management, of plans. These so-called "settlor" functions include decisions relating to the establishment, termination and design of plans and are not fiduciary activities subject to Title I of ERISA.

ERISA Op. Ltr. (Mar. 13, 1986), 13 Pens. Rep. (BNA) 472 (Mar. 17, 1986). In this case, Petitioner seeks a rule that would allow employer/fiduciaries to blur the clear distinction between these functions and thereby enable employer/fiduciaries to deceive with impunity and persuade participants to take a ruinous course designed solely for the employer's advantage.

Thus, the question is squarely presented: Was Petitioner acting as an ERISA fiduciary when *implementing* Project Sunshine and misrepresenting its impact on plan benefits? To answer this question, this Court should look first to the statutory definition of "fiduciary." *See New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, ___ U.S. ___, 115 S. Ct. 1671, 1677 (1995) (the Court begins "any exercise of statutory construction with the text of the provision in question, and move[s] on, as need be, to the structure and purpose of the Act in which it occurs"). Indeed, to determine whether conduct is fiduciary in character, courts "examine first the language of the governing statute, guided not by 'a single sentence or member of a sentence, but looking to the provisions of the whole law, *and to its object and policy*.' " *John Hancock*, 114 S. Ct. at 523 (quoting *Pilot Life*, 481 U.S. at 51). ERISA defines a fiduciary as follows:

> [A] person is a fiduciary with respect to a plan to the extent (i) he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets, . . . or (iii) he has any discretionary authority or discretionary responsibility in the administration of such plan.

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[8] *See* ERISA Op. Ltr. (Jan. 31, 1994) ("[S]ection 408(c)(3) has no bearing on the applicability of the fiduciary duties set forth in [S]ection 404 of ERISA"). Exceptions to general policies are generally read narrowly. Thus, the Department of Labor stated in the above-referenced opinion letter that, notwithstanding Section 408(c)(3), a prohibited transaction under Section 406(b)(2) would still occur if a fiduciary's "dual loyalties . . . would prevent him from acting solely in the interests of the plan's participants. . . . " Similarly, this Court is

> inclined, generally, to tight reading of exemptions from comprehensive schemes of this kind, *see, e.g., Commissioner v. Clark*, 489 U.S. 726, 739-740 (1989) (when a general policy is qualified by an exception, the Court "usually reads the exception narrowly in order to preserve the primary operation of the [policy]"), *A.H. Phillips, Inc. v. Walling*, 324 U.S. 490, 493 (1945) (cautioning against extending exemptions "to other than those plainly and unmistakably within its terms,"). . . .

John Hancock Mut. Life Ins. Co. v. Harris Trust & Sav. Bank, ___ U.S. ___, 114 S. Ct. 517, 524-25 (1993).

29 U.S.C. §1002(21). This is a *functional* test in the sense that a person is a fiduciary whenever he, she, or it is performing *any* of the functions that make a person a fiduciary; indeed, the term "fiduciary" under ERISA is an expansive term. *Kayes v. Pacific Lumber Co.*, 51 F.3d 1449, 1459 (9th Cir. 1995). This Court has recently stated: "Congress commodiously imposed fiduciary standards on persons whose actions affect the amount of benefits . . . plan participants will receive." *John Hancock*, 114 S. Ct. at 524; *see also Mertens v. Hewitt Assocs.*, ___ U.S. ___, 113 S. Ct. 2063, 2066 (1993). Thus, when comparing ERISA to the common law, this Court has held that ERISA "expand[s] the universe of persons subject to fiduciary duties. . . . " *Id.* at 2071.

In applying the definition of "fiduciary" to distinguish between an employer's settlor and fiduciary functions, courts have distinguished between *deciding* to offer (or not offer) benefits, on one hand, and *implementing* that decision, on the other. For example, a quintessential business decision is the determination of employee compensation, including benefits. Nowhere in ERISA did Congress restrict an employer's choice regarding whether to offer benefits and, therefore, courts have taken care to leave that right unaffected. *See Berlin*, 858 F.2d at 1163-64. Likewise, an employer's decision to amend or terminate a plan is not governed by fiduciary standards of conduct. This Court recently stated:

> Employers or other plan sponsors are generally free under ERISA, for any reason at any time, to adopt, modify, or terminate welfare plans. *See Adams v. Avondale Industries, Inc.*, 905 F.2d 943, 947 (CA 6 1990) ("[A] company does not act in a fiduciary capacity when deciding to amend or terminate a welfare benefits plan").

Curtiss-Wright Corp. v. Schoonejongen, ___ U.S. ___, 115 S. Ct. 1223, 1228 (1995). *Accord New York State Conference*, 115 S. Ct. at 1674 (ERISA "does not go about protecting plan participants and their beneficiaries by requiring employers to provide any given set of minimum benefits").

In sharp contrast, *implementing* the decision to adopt, amend, or terminate employee benefit plans is purely fiduciary conduct. The Department of Labor has stated:

> Although the *decision* to terminate is generally not subject to the fiduciary responsibility provision of ERISA, the Department has emphasized that activities undertaken to *implement* the termination decision are generally fiduciary in nature.

ERISA Op. Ltr. (Mar. 13, 1986), 13 Pens. Rep. (BNA) 472 (Mar. 17, 1986) (emphasis added). *Implementing* the modification or termination of a plan falls squarely within the definitions of "management" (*e.g.*, executive function) and "administration" (*e.g.*, techniques employed in achieving the objectives), which are part of the ERISA definition of "fiduciary."[9]

[9] The courts have adopted this same distinction; in the words of the Ninth Circuit:

> Plaintiffs allege that Blue Cross breached its fiduciary duty by choosing annuity providers using an infirm bidding process that sacrificed participants' and beneficiaries' best interests to maximize the reversion of residual plan assets. . . . Blue Cross maintains that it did not breach its fiduciary duty to the Plan because purchasing annuities as part of a plan termination is not a fiduciary act.
>
> * * *

In addition, individuals and companies act as plan fiduciaries when making material misrepresentations when *implementing* decisions to offer, amend, or terminate benefits:

> [W]hile . . . the decision to offer MIPP benefits was a nonfiduciary business decision, we do not agree with the district court's conclusion that it logically follows that any communications or representations made prior to such a decision were also nonfiduciary. On the contrary, we hold that when serious consideration was given by MBT to *implementing* MIPP by making a second offering . . . , then MBT as the plan administrator and/or its Vice President of Personnel Grady, the plan fiduciary, had a fiduciary duty not to make misrepresentations . . . to potential plan participants concerning the second offering.

Berlin, 858 F.2d at 1163-64 (citations omitted).[10]

For example, an employer announcing a "one-time offer" of an early retirement plan could be held liable for

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> By alleging that Blue Cross breached its fiduciary duty in the selection of annuity providers, plaintiffs attack not the *decision* to terminate, but rather the *implementation* of the decision. We believe that this distinction is dispositive and hold that Blue Cross acted in a fiduciary capacity when choosing annuity providers to satisfy plan liabilities.

Waller v. Blue Cross of California, 32 F.3d 1337, 1341-42 (9th Cir. 1994) (emphasis in original).

[10] *See also Maez v. Mountain States Tel. & Tel., Inc.*, No. 93-1184, 1995 U.S. App. LEXIS 9155, *34-37 (10th Cir. April 19, 1995); *Mullins v. Pfizer, Inc.*, 23 F.3d 663, 669 (2d Cir. 1994); *Fischer*, 994 F.2d at 135; *Drennan*, 977 F.2d at 250-52.

breach of fiduciary duty if "such a predictive statement- . . . were a 'material misrepresentation.' " *Barnes*, 927 F.2d at 544 (citation omitted). Such "one-time offer" statements would be material misrepresentations if, for example, the employer was seriously considering a second offer. *Id*. Likewise, plan fiduciaries have a duty not to mislead employees as to the prospective adoption of a plan under serious consideration. *Vartanian*, 14 F.3d at 702; *Drennan*, 977 F.2d at 249. Thus, in a case involving a situation similar to the present suit, the Eleventh Circuit reasoned:

> It is not clear from the record whether Osborne misrepresented to the employees of Powhatan that they were insured for the health plan when, in fact, they were not. . . . Clearly, if Osborne did make such misrepresentations, he would have breached his fiduciary duty to the health plan. The district court, however, did not make a finding of fact in this regard. The district court's order holding Osborne personally liable was predicated solely on Osborne's decision not to pay the insurance premiums.
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> * * *
>
> [T]his decision by Osborne to pay bills other than the insurance premiums was not made in his capacity as fiduciary of the health plan, it was made as the president of the corporation. . . . *This distinction in the role of president of the corporation as opposed to the role as fiduciary of the plan does not diminish in any way the obligation of the fiduciary to keep the beneficiaries (employees) advised as to the status of the plan, insurance coverage, etc.* . . . .

Local Union 2134, United Mine Workers of America v. Powhatan Fuel, Inc., 828 F.2d 710, 713-14 (11th Cir. 1987) (emphasis added; citations omitted).[11]

In each of the above-referenced situations, courts determined that deciding to offer a plan or terminate a plan, or which bills to pay, were *business* decisions that did not, standing alone, involve a fiduciary function. The courts ruled, however, that in *implementing* those business decisions, the employers were subject to the fiduciary duties imposed under ERISA which require full and honest disclosure of *all* information that would have a material impact on the participants' own decisions or status. The courts have properly held that these acts constitute discretionary authority or control over the management or administration of the plans and, as such, are subject to the fiduciary duties provided under ERISA.

In the event that this Court concludes that Petitioner was *not* acting as an ERISA fiduciary when misrepresenting the viability of MCC and stating that the employee benefits provided by MCC would be the same as those provided by Petitioner, the jury verdict for Respondents on their common law claims should be reinstated. Specifically at trial, the jury returned a verdict for the Respondents on their common law claims for fraudulent misrepresentation and punitive damages. 25a, 44a, 45a, 112a, 113a. The District Court set aside the jury verdict for fraudulent misrepresentation as preempted by ERISA.

[11] *Cf. Payonk v. HMW Indus., Inc.*, 883 F.2d 221, 229 (3d Cir. 1989) ("[A]n employer's lawful termination decision, absent affirmative misrepresentations designed to mislead plan participants, is not governed by ERISA's standards of fiduciary duties.").

The court set aside the jury's award of punitive damages solely because such relief is *not* available under ERISA. *Id.* The Eighth Circuit upheld the District Court's rulings on these claims for the same reasons. (10a, 11a). Therefore, in the event that this Court decides that ERISA does not govern the complained of conduct, this case should be remanded to the District Court with instruction to reinstate the jury's verdicts and awards in favor of Respondents on their common law claims.

C. UNDER ERISA'S STATUTORY SCHEME, SUBSECTION 502(a)(3) PROVIDES THE RELIEF GRANTED BELOW

Violations of Sections 404(a) and 406 are prosecuted under Section 502(a), ERISA's main civil enforcement provision, which provides that a civil action may be brought, *first*, "by a participant or beneficiary" to "recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan," 29 U.S.C. §1132(a)(1)(B); *second*, by the Secretary of Labor "or by a participant, beneficiary, or fiduciary for appropriate relief under section 1109 of this title," 29 U.S.C. §1132(a)(2); and/or *third*, "by a participant, beneficiary, or fiduciary" to "enjoin any act or practice which violates any provision of this subchapter or the terms of the plan" or to "obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan." 29 U.S.C. §1132(a)(3)(A)-(B).

Given the express language of Section 502(a)(3) and Congress' importation of the common law of trusts when

it enacted ERISA, it is not surprising that the Third, Fifth, Sixth, Seventh, Eighth and District of Columbia Circuits have all recognized that ERISA permits a direct action for relief to an individual participant or beneficiary for breach of fiduciary duty.[12]

In *Russell*, this Court held that subsection 502(a)(2) of ERISA does not grant individual participants a right to recover extra-contractual damages, specifying that any remedy thereunder can only inure to the benefit of the plan. However, *Russell* specifically reserved the question of whether subsection 502(a)(3) grants participants and beneficiaries a right of action for direct relief.[13] Petitioner

[12] *See In re Unisys Corp. Retiree Medical Benefit ERISA Litigation*, No. 94-1875, 1995 U.S. App. LEXIS 15921, at *32-*39 (3d Cir. June 28, 1995) ("*Unisys*"); *Anweiler v. American Elec. Power Serv. Corp.*, 3 F.3d 986, 993 (7th Cir. 1993); *Corcoran v. United Healthcare, Inc.*, 965 F.2d 1321, 1336 (5th Cir.), *cert. denied*, ___ U.S. ___, 113 S. Ct. 812 (1992); *Warren v. Society Nat'l Bank*, 905 F.2d 975, 978-83 (6th Cir. 1990), *cert. denied*, 500 U.S. 952 (1991); *Eddy*, 919 F.2d at 750. The Ninth Circuit, constrained by its decision in *Sokol v. Bernstein*, 803 F.2d 532 (9th Cir. 1986), either recognizes the functional equivalent of a breach of fiduciary duty claim by imposing a constructive trust under federal common law in ERISA cases, *Waller*, 32 F.3d at 1340, or has held that such state law claims are *not* preempted by ERISA. *Amalgamated Clothing & Textiles Workers Union, AFL-CIO v. Murdock*, 861 F.2d 1406, 1416-19 (9th Cir. 1988). *Accord Farr*, 1995 U.S. App. LEXIS 15705, at *9-*17.

[13] In *Russell*, the majority opinion stated that " 'we have no occasion to consider whether any other provision of ERISA [apart from subsection 502(a)(2)] authorizes recovery of extra contractual damages.' " 473 U.S. at 139 (citation omitted). The only pronouncement by this Court with respect to the propriety of claims under subsection 502(a)(3) is contained in Justice Brennan's concurrence in *Russell*, which was joined by three other Justices. After a thorough analysis of ERISA's language and

contends that recognition of such a right in subsection 502(a)(3) is inconsistent with *Russell* and would nullify this Court's interpretation of 502(a)(2). This makes no sense. Subsection 502(a)(3) grants participants and beneficiaries a right to equitable relief, not only for enforcement of the terms of the plan but also for violations of "*any provisions* of this subchapter." 29 U.S.C. §1132(a)(3)(B). The subchapter in which Section 502 is contained is entitled "Protection of Employee Benefit Rights" and consists of Section 2 through Section 515 of ERISA, 29 U.S.C. §§1001-1145.

Thus, subsection 502(a)(3) clearly includes suits brought to remedy violations of subsections 404(a) and 406, which both set forth the standards of conduct for plan fiduciaries. This conclusion inescapably follows from analyzing ERISA in a manner that is consistent with this Court's admonition to apply and give effect to the text of the statute while improving, if necessary, its object and policy. Congress enacted ERISA in order

> to provide the *full range* of legal and equitable remedies available in both state and federal courts and to remove jurisdictional and procedural obstacles which in the past appear to have hampered effective enforcement of fiduciary responsibilities under state law.

structure and a comprehensive review of the statute's legislative history, Justice Brennan concluded that subsection 503(a)(3) grants participants and beneficiaries a direct claim for breach of fiduciary duty. *Russell*, 473 U.S. at 151-52 (Brennan, J., concurring in the judgment).

S. Rep. No. 127, 93d Cong., 2d Sess. (1974), *reprinted in* 1974 U.S. Code Cong. & Admin. News 4638, 4871. At common law, the most significant procedural obstacle to effective enforcement of fiduciary responsibility was the rule that only plan trustees, as opposed to beneficiaries, could bring suits concerning trust property. *See* A. Scott & W. Fratchew, *The Law of Trusts*, §§281, 282 (1989). Given Congress' intention to remove such impediment to suits brought under ERISA for fiduciary breaches, it necessarily follows that subsections 409(a) and 502(a)(2) of ERISA were enacted in order to change the common law by providing, *inter alia*, plan participants and beneficiaries with a direct cause of action to remedy damage to the plan, without having to rely upon the named trustee to sue.

In contrast, while subsections 409(a) and 502(a)(2) remove procedural impediments to recovery on behalf of the plan, subsection 502(a)(3) gives effect to and broadens the above-referenced equitable remedies available in both state and federal courts. Specifically, it was well established at common law that participants and beneficiaries have the right to sue plan trustees for breach of fiduciary duty. *See Restatement (Second) of Trusts* §295, comment a. By enacting subsection 502(a)(3), Congress codified this common law right and provided protection to plan participants and beneficiaries by permitting suit against any fiduciaries.

This Court has warned against tampering with the carefully crafted enforcement scheme set forth in subsection 502(a) because ERISA contains an "interlocking, interrelated, and interdependent remedial scheme, which is in turn part of a 'comprehensive and reticulated statute.' " *Russell*, 473 U.S. at 146-47 (quoting *Nachman Corp.*

v. Pension Benefit Guaranty Corp., 446 U.S. 359, 381 (1980)). Applying this principle, it is evident from its statutory language that subsection 502(a)(3) includes claims against plan fiduciaries; indeed, each part of subsection 502(a) expressly identifies and limits those with standing to bring the claims provided for thereunder.

For example, claims under subsection 502(a)(3) may be brought only "by a participant, beneficiary, or fiduciary." 29 U.S.C. §1132(a)(3). With regard to who are proper defendants, however, Congress chose not to limit those subject to suit in any manner, other than what is inherent in the nature of the claim itself. For example, claims under subsection 502(a)(2) are limited to fiduciary breaches (for which relief is provided by subsection 409) and may only be brought against fiduciaries. Subsection 502(a)(3), on the other hand, contains no limitations of those subject to suit thereunder. Thus, any decision prohibiting participants and beneficiaries – who are expressly given standing to sue – from bringing claims under subsection 502(a)(3) against fiduciaries and alleging a breach of their fiduciary duty would run afoul of carefully crafted and reticulated enforcement scheme.

Petitioner argues, (as it must) that claims for breach of fiduciary duty may be brought *only* under subsection 502(a)(3).[14] As this Court has held, however, this subsection provides relief only for the plan as a whole. *Russell*,

[14] Petitioner's related contention that subsection 502(a)(3) is the remedial provision for violations of ERISA's regulatory provisions is erroneous. First, the "regulatory provisions" cited by Petitioner each do, in fact, have corresponding remedial provisions. For example, ERISA's reporting and disclosure requirements are enforced through application of Section 502(c), 29 U.S.C. 1132(c), which, in certain circumstances, imposes

473 U.S. at 138-144. Petitioner seeks to deprive participants and beneficiaries of *any* means to protect themselves against fiduciary breaches injuries flowing therefrom. While Petitioner, its *amici* and employers would presumably applaud leaving plan participants and beneficiaries without a remedy for fiduciary breach, ERISA's statutory text, legislative history and notions of simple justice require that employees and retirees have adequate remedies against such violations of federal law.

The remedies provided by subsection 502(a)(1) (to recover benefits due under a plan) and subsection 502(a)(2) (which recognizes a remedy running *only* to a plan) do *not* provide relief in the myriad situations in which a fiduciary commits a severe breach of the fiduciary duties established by ERISA.

For example, a participant, who is deceived by a fiduciary into waiving and signing away rights to benefits under the terms of a plan (or, in the instant case, into switching from one plan to another) may not have a claim

monetary sanctions for a failure to furnish the information required by the reporting and disclosure provisions, and by Section 502(a), which "allows a participant to sue for appropriate relief" for violations of Section 105(a).

The illogical results compelled by Petitioner's proposed interpretation of Section 502(a) are most apparent when one considers the effect it would have on claims under Section 510, 29 U.S.C. §1140, for interference with protected rights. Under Petitioner's proposed reading of the statute, the most serious violations of Section 510 – those committed by a fiduciary, which also constitute breach of fiduciary duty – would not be remedied under Section 502(a)(3). Congress could not have intended such an illogical result.

under subsection 502(a)(1).[15] Under Petitioner's proposed interpretation of subsection 502(a)(3), such conduct would not be remedied by ERISA and any state law right of action would be preempted. *Unisys*, a case recently decided by the Third Circuit, provides another stark example of the kinds of egregious breaches of fiduciary duty that would go unremedied under Petitioner's proposed interpretation of ERISA. In that case, the employer-fiduciary, both in the summary plan description (among other documents) and in individual meetings and group presentations to employees, represented that post-retirement medical benefits would continue "for life." The Third Circuit found that this message was "confirmed repeatedly and systematically throughout the [organization], by all levels of management, in writing and verbally." 1995 U.S. App. LEXIS 15921, at *10. When defendants terminated these benefits, in an action brought by former employee participants, the court found that no claim existed under subsection 502(a)(1) because the plan contained a reservation of rights which permitted the employer to amend or terminate the plan at any time; thus, it held that plaintiffs could rely solely on subsection 502(a)(3). *Id.* at *32-*39.

The profound consequences of Petitioner's proposed interpretation of ERISA are apparent when one considers the following additional factual situations in which an ERISA fiduciary committed a breach of fiduciary duty

[15] *Cf. Anweiler*, 3 F.3d at 989, 991-92 (a fiduciary misleads a participant and convinces him to sign a waiver of rights under an employee benefit plan without disclosing that the participant did not have to sign such waiver, it was not in the participant's best interests to do so, and it was revocable at any time).

that was *not* redressable under subsections 502(a)(1) or (a)(2):

- A fiduciary intentionally misleads a participant regarding his right under ERISA to continue, at the participant's expense, insurance coverage previously paid for by the employer as part of an employee welfare benefit plan. As a result, the participant fails to exercise these rights in a timely manner and loses insurance benefits.[16]

- A fiduciary deliberately lies about an employer's intentions to establish an early retirement incentive program and several employees leave the company immediately prior to its implementation and fail to qualify for benefits thereunder.[17]

- A fiduciary fails to follow a participant's instructions to change the beneficiary of his life insurance plan, with the result that his intended beneficiary fails to receive the proceeds of the policy upon his death.[18]

As Petitioner acknowledges, and as this Court held in *Russell*, 473 U.S. at 142-43, "the principal statutory duties imposed on the trustees relate to the proper management, administration and investment of fund assets," and, *inter*

[16] *See Bixler*, 12 F.3d at 1300; *Eddy*, 919 F.2d at 750-52; *Howard v. Gleason Corp.*, 901 F.2d 1154, 1160 (2d Cir. 1990); *Iwans v. Aetna Life Ins. Corp.*, 855 F. Supp 579, 583 (D. Conn. 1994).

[17] *See Fischer*, 994 F.2d at 132; *Drennan*, 977 F.2d at 250; *Barns v. Lacy*, 927 F.2d 539, 544 (11th Cir.), *cert. denied*, 502 U.S. 938, (1991); *Berlin*, 858 F.2d at 1162-64; *Hall v. United Technologies Corp.*, 1995 WL 20951 (D. Conn. Jan. 12, 1995).

[18] *See Simmons v. Southern Bell Tel. & Tel. Co.*, 940 F.2d 614, 616-17 (11th Cir. 1991).

alia, the avoidance of conflicts of interest. It is inconceivable that Congress would have gone to such great lengths to articulate the foregoing duties and yet provide no mechanism to enforce them.

D. PETITIONER BREACHED ITS FIDUCIARY DUTIES TO RESPONDENTS

As noted above, the federal courts have uniformly held that a fiduciary has a duty to convey correct and complete information material to a beneficiary's circumstances. This duty arises under Section 404(a) of ERISA, 29 U.S.C. §1104(a), which imposes on fiduciaries a duty to act solely in participants' interest and with care, skill, prudence, and diligence. As Justice Cardozo observed:

> The trustee is free to stand aloof, while others act, if all is equitable and fair. He cannot rid himself of the duty to warn and to denounce, if there is improvidence or oppression, either apparent on the surface or lurking beneath the surface, but visible to his practiced eye.

Globe Woolen Co. v. Utica Gas & Elec. Co., 224 N.Y. 483, 489, 121 N.E. 378, 380 (N.Y. 1918) (*quoted in Eddy*, 919 F.2d at 752).

In the present case, Petitioner sought at every turn to misinform employees solely to serve its own interests. In addition to affirmatively deceiving participants, Petitioner made a calculated decision to withhold material information from participants in order to facilitate ridding M-F and Varity of liability for employee benefit obligations. 55a-56a, 63a-65a. Petitioner knew that such communications were materially misleading when they were prepared and distributed and that the employees

relied on the misrepresentations to their detriment. 65a. Thus, Petitioner breached its fiduciary duty to Respondents.

Petitioner argues that by setting forth certain disclosure and reporting duties,[19] ERISA implicitly excludes *any* fiduciary duty to communicate truthfully regarding plan information not expressly referred to in ERISA. Such an argument must fail because, as recently stated by the Third Circuit:

> [S]atisfaction by an employer as plan administrator of its statutory disclosure obligations under ERISA does not foreclose the possibility that the plan administrator may nonetheless breach its fiduciary duty owed plan participants to communicate candidly if the plan administrator simultaneously or subsequently makes material misrepresentations to those whom the duty of loyalty and prudence are owed.

Unisys, 1995 U.S. App. LEXIS 15921, at *23. Put another way, plan fiduciaries are required to disclose information to participants concerning benefits as long as the disclosures "do not contradict or supplant ERISA's express reporting and disclosure provisions." *Acosta v. Pacific Enterprises*, 950 F.2d 611, 619 (9th Cir. 1991). Thus, a fiduciary's duty is not discharged by simply complying

[19] Generally, plan administrators must provide to participants a summary plan description, a summary description of material modifications, and a summary annual report. *See* 29 U.S.C. §§1022, 1024. Upon request, a participant is entitled to receive the complete annual report. *See* 29 U.S.C. §1104. Other notification requirements arise with respect to certain types of plans in certain circumstances. *See* 29 U.S.C. §1021(d).

with ERISA's express reporting and disclosure requirements. *See Eddy*, 919 F.2d at 780.

Indeed, ERISA does not expressly provide for the disclosure of a variety of information needed by participants to protect their interests. For example, as one commentatory has observed:

> Because ERISA's annual report and summary annual report requirements do not provide plan financial information to participants and beneficiaries until at least seven months after the close of a plan year, it is clear that they were not intended to provide timely information to participants and beneficiaries in all circumstances. Thus, imposing a fiduciary duty to disclose to participants information relating to plan investments in circumstances where it is crucial to enable them to protect their interests can be viewed as neither contradicting nor supplanting ERISA's express financial disclosure provisions.

Fiduciary Responsibility, 54 U. Pitt. L. Rev. at 1008. In addition, this Court has rejected the maxim *expressio unius est exclusio alterius* as often as it has used it, generally preferring more reliable means of statutory construction.[20] The maxim properly applies

> only when in the natural association of ideas in the mind of the reader that which is expressed is so set over by way of strong contrast to that which is omitted that the contrast enforces the affirmative inference that that which is omitted

[20] *See Thunder Basin Coal Co. v. Reich*, ___ U.S. ___, 114 S. Ct. 771, 777 n.11 (1994); *Herman & MacLean v. Huddleston*, 459 U.S. 375, 387 n.23 (1983); *Shurtleff v. United States*, 189 U.S. 311, 316 (1903).

must be intended to have opposite and contrary treatment.

Ford v. United States, 273 U.S. 593, 611 (1927).

With respect to ERISA's disclosure requirements, there is no reasoned basis to infer that Congress authorized fiduciary misrepresentations and omissions of material information. A fiduciary's duty to refrain from making misrepresentations (and, indeed, affirmatively to impart material information necessary to protect the beneficiaries' interests), was well-established prior to the enactment of ERISA and falls within the scope of the affirmative statutory duties imposed on plan fiduciaries. To interpret that duty out of existence simply because the statute does not expressly provide for it in the disclosure section would be unfaithful to Congress' intent that fiduciary obligations devolve from the common law of trusts and violate ERISA's primary objectives of protecting and promoting the interests of employees and their beneficiaries, and "establishing standards of conduct, responsibility, and obligation for fiduciaries." 29 U.S.C. §1002(b)(1).

Petitioner's misrepresentations and deceptions violate the fiduciary's duties of undivided loyalty, care and prudence. Prohibiting such deception will in no way chill employers from offering employee benefits, but instead will cause fiduciaries to take care that when they speak they speak truthfully. Put differently, there is no question but that prior to ERISA's enactment Petitioner would have been subject to liability for the fraud or misrepresentation which the District Court determined they perpetrated. Because Petitioner's conduct relates to employee benefit plans directly, however, ERISA preempts such common law causes of action. Thus, without the ability to protect their interests by bringing such claims under ERISA, plan participants and beneficiaries would be placed at the mercy of fiduciaries whose earnings are paid by plan sponsors. It is impossible to imagine that when enacting ERISA Congress intended to strip participants and beneficiaries of existing remedies against such deception directly relating to employee benefit plans. Congress intended exactly the opposite: Congress enacted ERISA to provide the full range of relief available in state and federal courts and to remove any procedural obstacles to enforcing fiduciary responsibilities.

CONCLUSION

Petitioner's proposed interpretation of Sections 404(a) and 502(a) of ERISA finds no support in its statutory language, structure, or legislative history. Equally important, such an interpretation would have a profound impact on the ability of participants and beneficiaries to obtain redress for egregious breaches of fiduciary duty. Because state law remedies are usually preempted by ERISA, Petitioner's reading would grant fiduciaries a license to lie, condone reckless and negligent conduct and permit fiduciaries to appropriate plan assets for their own purposes. Petitioner cannot seriously argue that in striking a balance between ERISA's primary goal of protecting participants and beneficiaries and its goal of

encouraging the formation of employee benefit plans, Congress intended such a result.

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Respectfully submitted,

KEVIN P. RODDY
Counsel of Record
MILBERG WEISS BERSHAD
HYNES & LERACH
355 South Grand Avenue
Suite 4170
Los Angeles, CA 90071
Telephone: 213/617-9007

JONATHAN W. CUNEO
General Counsel
NASCAT
317 Massachusetts Avenue, N.E.
Washington, DC 20002

BRYAN L. CLOBES
MILLER FAUCHER CHERTOW
CAFFERTY & WEXLER
One Penn Square West
Philadelphia, PA 19102

STEPHEN P. HOFFMAN
KARL J. STOECKER
POMERANTZ HAUDEK BLOCK &
GROSSMAN
100 Park Avenue
New York, NY 10017-5516

HENRY H. ROSSBACHER
TRACY YOUNG
ROSSBACHER & ASSOCIATES
445 South Figueroa Street
Los Angeles, CA 90071

STEVE W. BERMAN
CLIFF A. CANTOR
HAGENS & BERMAN
1301 Fifth Avenue
Seattle, WA 98101